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Supreme Court of The United States

OCTOBER TERM, 1969

No. [redacted] 136

HAROLD WHITELEY,

Petitioner,

v.

THE WARDEN OF THE WYOMING STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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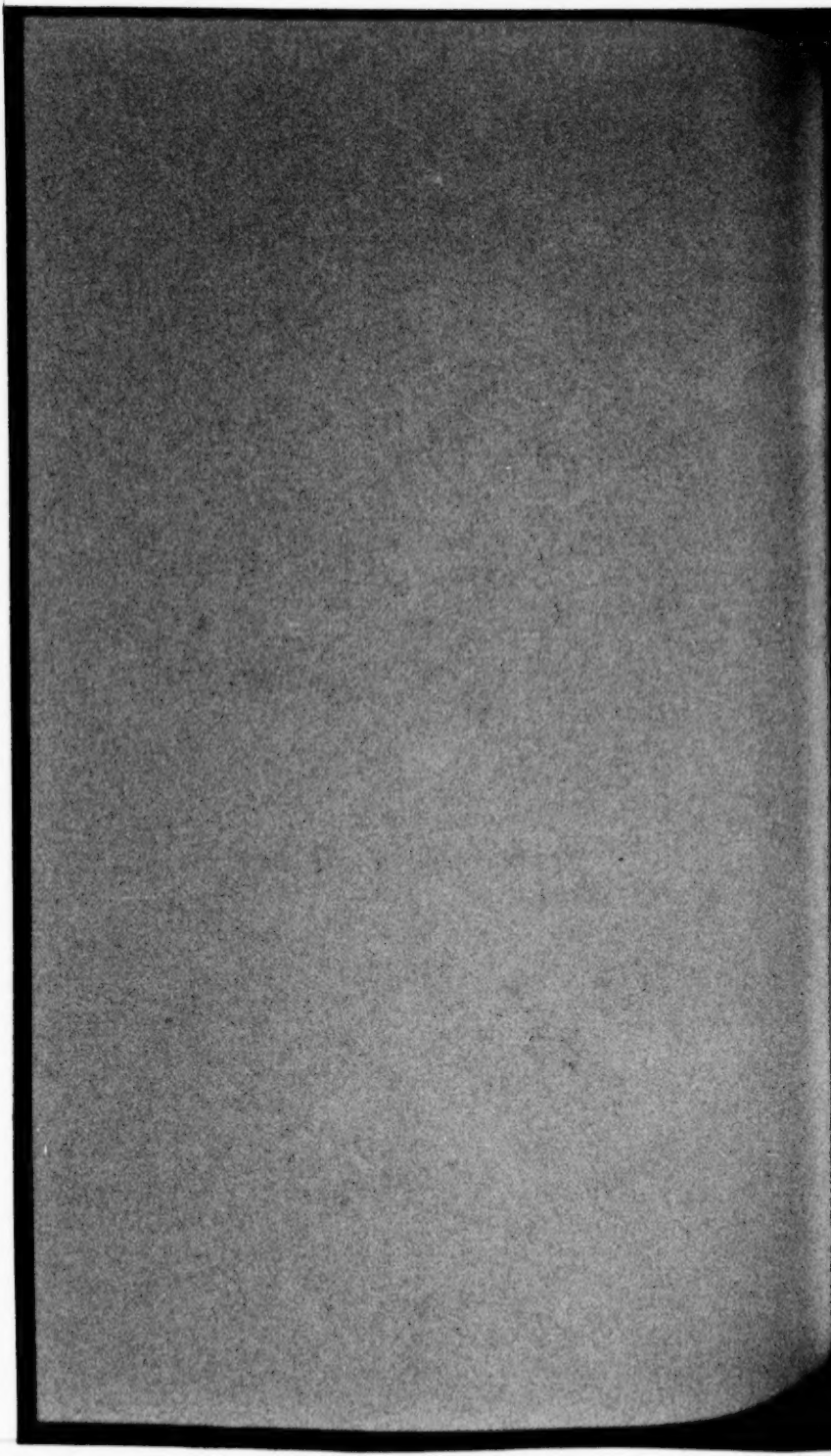
July 10, 1970



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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1969

No. 1486

HAROLD WHITELEY,

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v.

THE WARDEN OF THE WYOMING
STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Wyoming is reported at 418 P. 2d 164 (1966). (This case establishes the factual issues pertaining to probable cause for the arrest and subsequent search and seizure.) The opinion of the United States District Court for the District of Wyoming (App. 73-82) is reported at 293 F. Supp. 381 (D. Wyo. 1968).

QUESTION PRESENTED

Whether petitioner's arrest by the Laramie police on November 24, 1964, was based on probable cause and, if not, whether the search and seizure incident to that arrest was also illegal and, if so, was the introduction of such illegally seized contraband at petitioner's trial reversable prejudicial error.

STATEMENT

A. Nature of Proceedings to Date

The state generally accepts the Statement of Case set out in petitioner's Brief; however, the state wishes to succinctly present for the benefit of the court the following chronological listing of courts which have reviewed the very issue now before this court with the appropriate dates and citations. Each of the following-named courts has reviewed the entire record of petitioner's case, particularly as relates to the question of whether or not there was probable cause for the law enforcement officers to make the arrest and subsequent search and seizure of items from petitioner's car. Each court has come to the same conclusion, that a law enforcement officer has the authority and *duty* to make a warrantless arrest when the totality of the circumstances indicates that a felony has been committed.

(1) Wyoming Supreme Court, original appeal of petitioner's case, decision reported at 418 P.2d 164 (Wyo. 1966).

(2) Wyoming District Court, petition for Post-Conviction Relief, unreported decision handed down June 5, 1967. No appeal perfected (App. 6-7).

(3) United States District Court for the District of Wyoming, Habeas Corpus Petition, decision reported at 293 F. Supp. 381 (D. Wyo. 1968).

(4) United States Court of Appeals for the Tenth Circuit, Appeal of Habeas Corpus Action, decision reported at 416 F.2d 36 (10th Cir. 1969).

B. Facts

In addition to the facts related in the Statement of Case in petitioner's Brief, the state supplies the following. The complaining witness, C. D. Ogburn, Sheriff of Carbon County, Wyoming, testified that after he received the arrest warrant from Magistrate O. E. Castle, Justice of the Peace, Carbon County, Wyoming, he caused to be placed on the state police network radio "Highway Patrol Item 881" (App. 52-53). State Highway Patrol Item 881 (App. 31, 37) spelled out with particularity the name and description of the petitioner, including height, weight and color of hair. It further related the description of the automobile which petitioner was driving when arrested and it further detailed a partial description of the stolen property, including reference to an amount of cash taken and old coins.

In addition to the introduction of these seized items at petitioner's trial in November, 1964, there is testimony by the petitioner's accomplice to the effect that the petitioner was guilty of committing the felony of breaking and entering. It is noted that this line of testimony was presented to the jury prior to the introduction of the seized contraband found in petitioner's car (App. 42-47).

ARGUMENT

WHETHER PETITIONER'S ARREST BY THE LARAMIE POLICE ON NOVEMBER 24, 1964, WAS BASED ON PROBABLE CAUSE AND, IF NOT, WHETHER THE SEARCH AND SEIZURE INCIDENT TO THAT ARREST WAS ALSO ILLEGAL AND, IF SO,

WAS THE INTRODUCTION OF SUCH ILLEGALLY SEIZED CONTRABAND AT PETITIONER'S TRIAL REVERSABLE PREJUDICIAL ERROR.

The key to the presentation before this court is one based on facts rather than law. The central issue is a determination of whether or not there was sufficient probable cause, based on the totality of the circumstances, for the arresting officers to make an arrest of the petitioner. The Tenth Circuit held that there was (App. 92). Throughout the lower state and federal courts petitioner has attempted to equate the case law and treatise authorities concerned with the requisite probable cause necessary in the mind of a judicial officer for issuance of an arrest or search warrant to be the same requisite probable cause for an arresting officer to make a warrantless search. Quite clearly the lower courts, starting with the Wyoming Supreme Court, have made the factual determination that there existed the requisite probable cause for arresting officers to make the arrest of petitioner without a warrant. These courts have not imposed upon the arresting officer the reasoning petitioner urges upon this court that the criteria for finding probable cause imposed upon a judicial officer prior to issuing an arrest or search warrant should be the same for an arresting officer prior to making a warrantless arrest.

Early in these proceedings the Wyoming Supreme Court made the factual determination that the law enforcement officers did have sufficient probable cause to believe that the petitioner had committed a felony (See *Whiteley v. State*, 418 P.2d 164, 167, Wyo. 1966). Because of this finding the United States Court of Appeals for the Tenth Circuit, pursuant to Title 28, U.S.C., Section 2254, held that these factual issues determined by the state court shall be presumed to be correct (App. 86). The Tenth Circuit

further held, relying on this statute, that neither the record before them nor the brief of arguments of petitioner question the key factual determination of the Wyoming court that the arresting officer had probable cause to make the arrest. The state suggests that the legal basis upon which petitioner makes his argument before this court is grounded upon a factual premise that does not exist anywhere in the record that has been presented before this court or, for that matter, before any court. Specifically, petitioner centers his legal arguments and logic on the facual premise that probable cause was not present for a judicial officer to issue an arrest warrant which *directly* or *indirectly* resulted in an illegal arrest of petitioner. This factual determination was not made by the Wyoming Supreme Court and there is nothing in the record upon which this legal argument can be based.

It is clear from the record presented before this court that the arresting officers who made the arrest of petitioner did so in the belief that the petitioner had committed a felony. The law enforcement officers knew the petitioner based on a fairly detailed description. They further knew that there was a great possibility that the petitioner had in his possession the stolen goods. The law enforcement officers knew this information not from an arrest warrant that was issued by O. E. Castle, the local Justice of the Peace, but rather from a Highway Patrol Item 881 (App. 31, 37). The arresting officer, Undersheriff Lankford of Albany County, testified that he knew exactly what he was searching for from this Highway Patrol Item (App. 59). The record fails to reveal that the law enforcement officers who made the arrest were relying upon anything other than contained in Highway Patrol Item 881. It is clear the Wyoming court considered this in arriving at the conclusion that the arresting officers not only had a right but a duty to make the arrest of petitioner based upon the Highway Patrol bulletin. In this case the law enforcement offi-

cers in the regular course of their employment were advised in the usual method from their superiors that the petitioner was a suspected felon. There is testimony to indicate that the arresting officer knew the petitioner's companion, had a detailed description of petitioner and his car (App. 56, 59). It was concluded by the Wyoming court that had the arrest not been made the officer would have been in violation of his duty (See *Whiteley v. State*, 418 P.2d 164, 167 (Wyo. 1966). Further, the Tenth Circuit took the position that there existed probable cause for the detention which was established at the Preliminary Hearing and reinforced at the trial by decision of the Wyoming Supreme Court (App. 91).

Incident to this lawful arrest the petitioner's car was searched within the immediate proximity of the petitioner (App. 48, 56, 58). The petitioner, in the closing paragraphs of his petition, makes reference to *Chimel v. California*, 395 U.S. 752 (1969). He fairly acknowledges that this aspect of the case was not reviewed by the Tenth Circuit. The state certainly urges this court not delve into this aspect of the case without a factual record to consider. Further, the search of petitioner's car occurred in November of 1964, which makes in pre-Chimel in nature.

The legal principles relied upon by the state throughout this entire litigated process have been based on the premise that a law enforcement officer may make a warrantless arrest if he has requisite probable cause, which can be something less than the requisite probable cause that must be presented to a judicial officer prior to the issuance of an arrest or search warrant. Most certainly the state's original Brief presented to the Wyoming Supreme Court made this point very clearly (R., Vol VI, pages 14 and 15).

> Second, that in order for the search and seizure to be legal, the arrest, if without a warrant and for a felony not committed in the presence of officers must

be on probable cause. See *Draper v. U.S.*, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329; *Henry v. U.S.*, supra; *State v. George*, supra. Third, that probable cause is present when the facts and circumstances known to the officers warrant a prudent man in believing an offense has been committed. See *Henry v. U.S.*, supra; *Carroll v. U.S.*, 267 U.S. 132, 45 S.Ct.Rep. 280, 69 L.Ed. 543; *People v. Carr*, 370 Mich. 251, 121 N.W.2d 449. Fourth, that the arresting officers need not have a quantum or quality of evidence necessary to convict. See *Wong Sun v. U.S.*, supra. Fifth, that the arresting officers are not dealing with fine legal points, but are dealing with considerations of every day life and are entitled to use their reasoning facilities upon all the facts of which they had knowledge with respect to the person arrested. See *Draper v. U.S.*, supra; *Carroll v. U.S.*, supra. Sixth, that the right to search is not dependent upon the practicality or ease of getting a search warrant. See *Kerr v. California*, 374 U.S. 23, 10 L.Ed.2d 726; *United States v. Rabinowitz*, supra; *State v. George*, supra. Seventh, that each case turns on its own facts. See *Brenigan v. State*, 97 Okla. Cr. 299, 262 P.2d 464.

It is the state's position that the federal Supreme Court law cited to the Wyoming Supreme Court is still proper law today and has not been modified by the recent cases of *Aguilar v. Texas*, 378 U.S. 108 (1964); *Barnes v. Texas*, 380 U.S. 253 (1965); *Giordenello v. United States*, 357 U.S. 480 (1958); *McCray v. Illinois*, 386 U.S. 300 (1967); and *Spinelli v. United States*, 393 U.S. 410 (1969). It is clear that the Wyoming Supreme Court relied upon these legal arguments and authorities in reaching its 1966 decision (See *Whiteley v. State*, 418 P.2d 164, 167). The state feels in reading *Aguilar*, *Barnes* and their companion cases that they must be read in light of their *peculiar* and *unique*

factual situations and should not be expanded beyond the purview of these factual situations.

In addition to the presence of sound logic and case law to support the state's position as to the presence of probable cause for the arrest, there are additional legal grounds to deny petitioner's relief. There is no showing in the record or legal arguments advanced by petitioner to support the proposition that the introduction of the seized evidence at petitioner's trial constitutes prejudicial error to the extent that petitioner's constitutional rights were violated. The case law is clear that petitioner has the burden to prove how the alleged error occurred and the existence of prejudice to the extent that petitioner's constitutional rights have been denied. *Buchalter v. People*, 319 U.S. 427, 431, 63 S.Ct. 1129, 87 L.Ed. 1492 (1943); *U.S. v. Hardy*, 351 U.S. 454, 462, 76 S.Ct. 965, 100 L.Ed. 1331 (1956). Absent a showing of prejudicial error by petitioner, the assertion will not stand. (See *State v. Spears*, 76 Wyo. 82, 300 P.2d 551 (1956); *Lowe v. U.S.*, 389 F.2d 108, 112 (8th Cir. 1968). In the case at bar the record is replete with testimony which clearly establishes guilt of petitioner without reference to seized evidence (App. 42-47). (See *Holmes v. U.S.*, 383 F.2d 925, 931 (D.C. Cir. 1967).

It is respectfully urged upon this court that should it consider petitioner's legal arguments as meritorious, the state should be given an opportunity prior to final decision by this court to develop a record which would reflect the basis upon which the Wyoming judicial officer issued the arrest warrant. Clearly the record before this court is void of any presentation as to whether or not there was the requisite probable cause present for the issuance of the arrest warrant by the judicial officer. In fairness to all sides, the state should be given an opportunity to make an evidentiary record if this court at this late date accepts the legal reasoning of petitioner. The reason this eviden-

tiary record has not been made at the various sundry post-conviction and habeas hearings is because the state has felt, based on precedent and logic, that no court would accept the legal reasoning of petitioner.

CONCLUSION

From the foregoing it is submitted that the petitioner has failed to establish sufficient legal arguments supported by authorities and further has failed to cite exact record references to overcome the provisions of appellate review as manifested in Rule 52 (a) of the F.R. Civ. P. which holds in part, "Findings of fact shall not be set aside unless clearly erroneous. . . " Judge Kerr's Memorandum (App. 73 et seq.) sets forth specific findings of fact on the issue presented by petitioner to this court. These findings of the District Court which received the approval of the United States Court of Appeals for the Tenth Circuit are entitled to the approval of this court sitting in review unless "clearly erroneous".

It is respectfully urged upon this court to affirm the judgments issued by the United States District Court for the District of Wyoming (App. 83) and the U.S. Circuit Court of Appeals for the Tenth Circuit (App. 93) and thereby deny petitioner the relief he has sought in his Petition for Certiorari as re-defined in his Brief filed before this court.

Respectfully submitted,

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July 10, 1970